Supreme Court, U.S.
FILED
JUN 19 1995

No. 95-126

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

CRAIG BLUE, PETITIONER

V.

DEPARTMENT OF THE TREASURY, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CRAIG BLUE

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QUESTIONS PRESENTED FOR REVIEW

I Does a federal employee have the right to appeal an agency's disciplinary action, including a termination, to the Merit Systems Protection Board? Were all rights waived when the "Last Chance Agreement" was signed?

II Did the Merit System Protection Board and the United States Court of Appeals for the Federal Circuit deny my procedural right to a hearing on the issue of whether there was a breach of the "Last Chance Agreement"?

III Was the "Last Chance Agreement" breached?

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Petitioner, Craig Blue, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Ninth Circuit in affirming the judgment of the Merit Systems Protection Board in dismissing the case for lack of Board appellate jurisdiction.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as Craig Blue v. Department of the Treasury, Fed.Cir.R.36. The judgment of the court was entered on March 23, 1995 pursuant to Rule 36. No opinion accompanied the judgement.

The opinion of the United States District Court is reported as case no. 94-3492 Fed.Cir.R.36. A petition was filed to this court because it was my understanding that when there is both discriminatory and nondiscriminatory issues the United States District Court would have jurisdiction. This was in error and, accordingly the case was

remanded to the United States Court of Appeals for the Federal Circuit.

The opinion of the Merits System Protection Board is reported as Craig Blue v. Department of the Treasury, 5CFR §1201. 113(b).

STATEMENT OF SUBJECT MATTER AND JURISDICTION

A federal employee may challenge an agency's disciplinary action, including a termination, by appealing the agency's decision to the Merit Systems Protection Board. 5 USC 7512(2), 7513(a), (d), and 7701(a) (1982).

The instant case represents a challenge of my, the Petitioner, employment by my employer, the Respondent. The agency's action is an adverse action as defined in 5 USC 7501, and therefore the Merit Systems Protection Board had subject matter jurisdiction.

5 Code of Federal Regulations §7703(c) states the relevant standard of review:

> "(c) In any case filed in the United States Court of Claims or a United States court of appeals, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be --
>
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) obtained without procedures required by law, rule or regulation having been followed; or
>
> (3) unsupported by substantial evidence;"

The decision of the Merit Systems Protection Board and the concurrence of the U.S. Court of Appeals not to hold a hearing on the issue of whether I breached the Last Chance Agreement, was arbitrary, capricious, and an abuse of discretion. The conclusion

that I breached the Last Chance Agreement is arbitrary and is not supported by the evidence. The United States Supreme Court has exclusive jurisdiction over petitions for judicial review of decisions by the United States Court of Appeals for the Federal Circuit.

STATEMENT OF THE CASE

I held the position of a Revenue Agent, Examination Division, in the Los Angeles District of the Internal Revenue Service for twelve years, six of which were as a Joint Committee Coordinator. I was a practicing alcoholic for several years and in March of 1992, I quit drinking and voluntarily entered a recovery program. The one year recovery program started on April 4, 1992, but I had met with my counselor, Bobby Carter, in March to establish the program.

A few days later, on April 9, 1992, I received a letter of adverse action which proposed to terminate my employment after 30 days. As a result I signed a "Last Chance

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Agreement". I agreed to maintain conduct acceptable to my supervisor, including all aspects of punctuality, attendance and leave usage. All of my requests for annual leave and anticipated sick leave for health care treatments were to be approved. I agreed to continue participation in the recovery program. I also waved all appeal rights for any action taken against me for attendance or on-duty problems related to alcohol abuse. The agency agreed to suspend termination referred to in the letter dated April 9, 1992. (Appendix, page 51)

I signed the agreement because I was a "recovering alcoholic" for only a short while and was not in a position to handle unemployment, etc. (I was unaware at the time that I may have been a "protected employee" under the Rehabilitation Act. Under this Act, alcoholism is a protected disability; I was in a recovery program and my evaluations were always excellent). (Appendix, page 83)

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On December 8, 1992, the Agency notified me that I had violated the Last Chance Agreement and that I was terminated. (Appendix, page 57)

The new Chief of Examination, Jerry Songy, has admitted I was not drinking and that there was no attendance or other on-duty misconduct problem related to alcohol abuse.

I appealed this termination to the Merit Systems Protection Board. The Agency made a motion to dismiss the appeal for lack of jurisdiction. I requested a hearing and offered a list of witnesses (including managers and a branch chief) who would confirm that I did not break the Last Chance Agreement. On August 24, 1993, Judge Lee of the Merit Systems Protection Board informed me by telephone that there would be no hearing.

A petition for a hearing made to the full board of the Merit Systems Protection Board also dismissed the case.

Because the case presented both discriminatory and nondiscriminatory aspects, I appealed to the United States Circuit Court. However, because the Merit Systems Protection Board failed to have a hearing and the jurisdictional issue had to be settled before the discrimination issue could be addressed, the United States Circuit Court remanded the appeal to the United States Court of Appeals.

SUMMARY OF THE ARGUMENT

I The Merit Systems Protection Board denied my procedural right to a hearing on the issue of whether I breached the Last Chance Agreement:

The Code of Federal regulations and the Merit Systems Protection Board Regulations provide for a hearing.

Where there is a non-frivolous factual issue raised by a government employee, the Board must resolve that issue, including holding a hearing, where appropriate, before

addressing the scope and applicability of the appeal rights waiver.

I have raised a non-frivolous factual issue of compliance with the Last Chance Agreement, and I am entitled to a hearing on the jurisdictional issue.

II I did not breach the Last Chance Agreement:

I properly called my immediate supervisor each morning and submitted acceptable medical evidence of my illness to support the sick leave requested for November 9, 10 and 12, 1992.

Unplanned sick leave cannot be requested in advance. I requested sick leave to attend an AA meeting on November 16, 1992. This was approved by the acting manager. It is not possible to provide "acceptable medical evidence" for attending an AA meeting. They are anonymous.

I made every attempt to notify my manager of a family emergency on November 17,

18 and 19 of 1992. On November 17, the manager was not available but I left several messages. The next morning, November 18, I received a phone call from Mary Ebinger. She informed me that my immediate supervisor, Steve LePore, had approved the leave for the 2½ days. Therefore I reasonably believed that my absences on these days were approved by my immediate supervisor.

ARGUMENT

A. THE MERIT SYSTEMS PROTECTION BOARD DENIED MY PROCEDURAL RIGHT TO A HEARING ON THE ISSUE OF WHETHER I BREACHED THE LAST CHANCE AGREEMENT

I requested a hearing on the issue of whether I had breached the Last Chance Agreement, and Judge Lee of the Merit Systems Protection Board erred by denying me this opportunity. I offered to produce the testimony of over ten witnesses (including managers and a branch chief) to confirm my statements. Originally, a hearing date was

set, but after the agency made a renewed motion to dismiss for lack of jurisdiction, Judge Lee made the decision not to hold a hearing.

In the last chance agreement, I waived all appeal rights for an action taken against me for attendance and any other on-duty misconduct related to alcohol abuse. The Chief of Examination, Jerry Songy, admitted to a union representative, Bill Evens, that there was no evidence of alcohol use. Therefore I did not waive my right to appeal to the Merit Systems Protection Board.

5 CFR Sec. 7701(a); Sec.1201.24(d), provides for the right to a hearing in an appeal to the Merit Systems Protection Board of an "adverse action" taken by the agency. Under the Merit Systems Protection Board regulations, appeals may take any form but must contain "(3) a request for hearing if the appellant wants one." The appellant must make a timely request for a hearing [5 CFR Sec.1201.24(e)] and judges can order a

hearing on their own initiative "if necessary i) to resolve credibility; ii) to ensure a fully developed record; or iii) to ensure a fair and just adjudication." 5 CFR Sec. 1201.41(b)(5).

Courts have long found that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact-finding, the protections afforded by due process of law entitle the individual to a fair opportunity to show the governmental action was unwarranted. In Fitzgerald v. Hampton, 467 F2d 755 (1972), the court held that a federal agency may not take adverse actions against a preference eligible employee "except for a cause which will promote the efficiency of the service," and in such an action, the employee has the right to notice and a hearing. Id. at 762.

Then, in 1975, in the case of Gratehouse v. United States, 512 F2d 1104 (Fed.Cir. 1975), the court held that even absent a specific statutory right, where there is a non-frivolous allegation by a government employee that his resignation was involuntary, he is entitled, in the usual case, to a hearing, on timely appeal to the (then) Civil Service Commission.

In Covington v. Dept. of Health & Human Services, 750 F2d 937 (Fed.Cir.1984), an appellant challenged the voluntariness of his retirement. That Court found that a federal employee's procedural rights were violated where he was denied a hearing on the issue of the voluntariness of his retirement. In citing both a Fifth Circuit case, Gonzalez v. Dept. of Transportation, 701 F2d 36 (5th Cir. 1983) and Gratehouse v. United States, supra, the court stated:

> "As in Gonzalez, the presiding official in the present appeal

> issued a decision on the merits of the jurisdictional issue, based solely upon the pleadings and written submissions of the parties. This violated procedures required by law that guarantee an employee a hearing on the issue of involuntary retirement."

Like Covington, the petitioner in Burgess v. Merit Systems Protection Board, 758 F2d 641(Fed.Cir.1985), did not receive a hearing on the jurisdictional issue. That court found that an involuntary resignation is a removal, "and as such the issue of jurisdiction is intertwined with the merits of an action appealable pursuant to 5 U.S.C. §§7512(1) and 7513(d). It is this connection with the merits of an appeal which prompts the need for a hearing." Id. at 643. The petitioner, in Stewart v. United States Postal Service, 926 F2d 1146 (Fed.Cir.1991) had appealed his dismissal, and the board dismissed his appeal because it found that

he had waived his appeal rights in a "last chance" settlement agreement. As in the instant case, the judge in Stewart declined to hold a hearing on any issues though requested by Stewart to do so. The court stated:

> "But we do not understand the board's refusal to address the threshold issue of breach. The last chance agreement predicates the reimposition of removal and concomitant waiver of appeal rights on breach of one or more of the other stipulations the agreement contains. Where, as here, an employee raises a non-frivolous factual issue of compliance with a last chance agreement, **the board must resolve that issue before addressing the scope and applicability of the appeal rights waiver."** Id. at 1148. (emphasis added)

In a footnote, the Stewart court notes that the waiver at issue applies only to the facts underlying the legal validity of the original removal. "Stewart did not waive his right to contest breach of the agreement itself." Id. at 1149.

In McCall v. U.S. Postal Service, it was asserted that the Last Chance Agreement was unenforceable as a matter of policy because it allowed arbitrary action. McCall, however, did not cite any basis for a claim that the action in his particular case was arbitrary or unreasonable. The following is a quote from this case:

> "We agree that the term "acceptable to management" does introduce a element of subjectivity into the agreement, but this does not mean that agencies would have a free hand to take arbitrary action employees. We think that it is implicit in the agreement here that

the agency must abide by it in good faith. Thus, the agreement itself serves as a check on arbitrary agency action. If any agency acts in bad faith or takes other arbitrary and capricious action, as a breaching it would not be able to enforce the agreement."

Since Stewart, the Board has consistently held that where an appellant raises a non-frivolous factual issue of compliance with a last chance settlement agreement, the board must resolve that issue, including holding a hearing, where appropriate, before addressing the scope and applicability of the appeal rights waiver. See Link v. Dept. of Treasury, 56 Merit Systems Protection Board 254(1993); Freemont v. U.S. Postal Service, 55 Merit Systems Protection Board. 57(1992); Butler v. Dept. of Navy, 58 Merit Systems Protection Board (1993).

I respectfully submit that I have raised a non-frivolous factual issue of compliance with the Last Chance Agreement. I did not break the Last Chance Agreement. I have requested a hearing on these issues from the beginning and have offered to provide witness testimony to prove my position.

B. I DID NOT VIOLATE THE LAST CHANCE AGREEMENT

I followed the procedures in notifying my employer of medical and family emergencies.

In good faith I believed the leave was approved and that my actions conformed to the Last Chance Agreement. Also please note that the phase in the Last Chance Agreement; "All requests for annual leave...must be approved in advance by his supervisor" cannot be construed to include unanticipated or emergency leave. To do so would be unreasonable and lacking in good faith.

The Last Chance Agreement cannot be used to support arbitrary and unjust action. In the 1991 federal court decision Stewart v.

United States Postal Service, 926 F2d 1146(Fed.Cir.1991), the judge stated:

> "In my opinion any employer should be understanding of urgent unfortunate circumstances as with this situation."

On each morning of November 9, 10 and 12, 1992, I called my immediate supervisor to request sick leave. On November 12, 1992, the acting manager was not available and I left a message with the secretary. I called each morning between 7:00 a.m. and 7:30 p.m. My normal work day began at 6:30 a.m. and I made a point of calling within one hour of that time and after 7:00 a.m. because I knew Iris Brown (acting manager) didn't start work until 7:00 a.m. The secretary normally came in later. Mary Ebinger (another Revenue Agent) is a witness as to the time of day I called and that I asked to speck to the acting manager before leaving any message. Iris Brown will also confirm that I called each day and that she approved the leave. (Appendix, page 63)

On November 23, 1992, my manager, Steve LePore, asked me for medical evidence. I informed him that I didn't think to go to a doctor with the flu but I was staying with a friend, Mary Ebinger, while I was sick (I was too unsure of my sobriety to be alone all day while I was sick). Steve LePore conferred with "upper management" and informed me on November 25, 1992 that a statement from Mary Ebinger would be accepted. This statement was provided to Steve and he stated the leave would be approved.

On November 16, 1992, I reported for duty at my regular time. Sometime later in the morning I want up to the seventh floor to discuss and review transcript information with Bobby Kirvin, the Priority Coordinator. This was a routine part of my job. While I was there I also talked with Tom Winford and Wendy Fisher, both managers. I came back to my desk shortly after 10:30 a.m. My manager was not in the area. (Appendix, page 64)

At approximately 11:00 a.m., I told the, I thought, acting manager, Iris Brown, that I was leaving for an appointment and was requesting sick leave. I left to attend an AA meeting. Iris Brown will confirm that I requested sick leave and that the regular manager was not in the office that morning. I called later to confirm I wasn't coming back on that day. The manager was still not in the office and I left a message with the secretary.

Unplanned sick leave cannot be requested in advance. Alcoholism is an illness and sometimes the need to go to an AA meeting cannot be requested in advance. The Last Chance Agreement provides for sick leave to attend rehabilitation meetings, which includes AA meetings. One reason I needed to attend a meeting was that there was very little work available in the office and the boredom made me uneasy.

On November 17, 1992, I arrived at work at my usual time, 6:30 a.m. My manager came in later, approximately. 8:00 a.m., and he saw me at my desk. Between 10:00 and 10:30 a.m., I received a phone call from my brother regarding a family emergency. I waited for an ½ hour for my manager to return (he had left the office). This was the first time my brother called me at work and also the first time he asked me to come to San Diego as soon as I could. He had to be taken seriously. The secretary saw me waiting around the manager's office and told me she didn't know when Steve LePore would be back but that she would give him the message. I drove to San Diego. As soon as I could I called the office but the manager was gone for the day. I left a more detailed message with the secretary. I would be on annual leave for two (2) days, Wednesday and Thursday (November 18 and 19) and I would be back at work on Monday (Friday was my AWS "off-day"). I explained to her

there was a family emergency regarding my brother and his two daughters. (Appendix, page 81)

On the morning of November 18, 1992, I received a phone call from Mary Ebinger. She told me that she had called the office to make sure Steve LePore knew I was on leave. She was told by his secretary that Steve LePore would not be in the office all day but that "we already know and everything is all right. Stop worrying about him."

Therefore I felt sure the leave was already acknowledged and approved.

Because of the emergency trip to San Diego, I missed a meeting with my counselor, Bobby Carter, on November 18, 1992. This meeting was missed only because I was in San Diego.

I have had several "extra" meetings with Bobby Carter. Usually I attended two meetings per week when only one was required. I was a regular and active participate in the rehabilitation program until I was terminated

and no longer qualified for the Employee Assistance Program. Bobby Carter would confirm this.

On December 7, 1992, Mary Ebinger and Steve LePore were talking (they are friends). Steve LePore said her statement regarding sick leave was accepted but that the "front office" (upper management) was having a problem with the trip to Lake Tahoe. When Mary asked him what trip, Steve explained that Christine Mitchell (my former manager before Steve LePore) received a phone message from Mary Ebinger that said she was driving me to Lake Tahoe on November 17 and that I would be there for two weeks. Mary explained to Steve that there must be some mistake. Mary was in CPE class all day (with her manager and branch chief) on November 17 and 18 and didn't drive me anywhere. Also I was back at work after 2½ days, not two weeks. (Appendix, page 69)

This was confirmed to Christine Mitchell by Nancy Stayer (Mary's Ebinger's

manager) and Willard Blaylock (branch chief) when she called Nancy to see if Mary was in CPE class. (Appendix, page 66)

Mary tried to convince management that she didn't make the call to Christine Mitchill. Steve LePore understood and said he would explain it to his Branch Chief, Carol Greenstein, but she was on leave. Mary Ebinger had no thoughts of driving me to Lake Tahoe or anywhere else. And why would she call a former manager? And, if I wanted to go to Lake Tahoe or anywhere else, why wouldn't I have said so when I requested leave? Neither Mary nor I can understand this message but there was no way of proving a negative. It was at this point that management changed the approved leave to AWOL.

Willard Blaylock, the Chief of the International Branch, said the reason for my termination was because of the inadequate budget in the Los Angeles District for

salaries. My former manager, Christine Mitchell, expected either a cash award or a specific job assignment she wanted in exchange for firing someone/anyone. Willard Blaylock would like to testify.

CONCLUSION

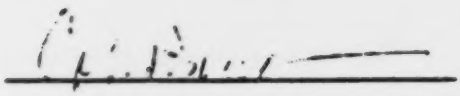
For the foregoing reasons, I did not breach the Last Chance Agreement. In addition, the Merit Systems Protection Board denied my procedural right to a hearing on the issue of whether I breached the Last Chance Agreement.

Therefore, a writ of certiorari should be issued to review the judgement of the Court of Appeals in this matter.

If this court elects not to address the issues presented in this writ at the present .ime, it is requested that the matter be remanded to the United States Court of Appeals for a hearing on the issue of breach of the Last Chance Agreement.

DATED: June 13, 1995

Respectfully submitted,



Craig Blue

APPENDIX

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

SAN FRANCISCO REGIONAL OFFICE

CRAIG M. BLUE, Appellant, v.	DOCKET NUMBER SF-0752-93-0526-I-1
DEPARTMENT OF THE TREASURY, Agency	DATE: September 13, 1993

Elizabeth Smith, Esquire, San Diego, California, for the appellant.[1]

Richard M. Slizeski, Esquire, San Francisco, California, for the agency.

1 Although the appellant's petition for appeal refers to Attorney Elizabeth Smith, all of the appellant's submissions to the Board were made by him.

ANALYSIS AND FINDINGS JURISDICTION

The agency's dismissal motion is based on an August 12, 1992, "Last-Chance Agreement"(LCA) in which the appellant purportedly waived his Board appeal right. As background information, there is no dispute that the appellant entered into the LCA. The record shows that on April 9, 1992, the agency issued the appellant a notice of proposed removal. The notice proposed the appellant's removal based on his alleged intoxication in the workplace, inability to perform the duties of his position, and failure to observe his duty hours, i.e., Absence Without Leave (AWOL). This alleged misconduct was described in some 14 specifications. Additionally, the proposal referred to the appellant's past discipline of a reprimand on December 31, 1991, for failing to follow leave instructions and AWOL. See Initial Appeal File (IAF), Vol. 1,

Tab 1, Appellant's petition for appeal, with attachments. However, by letter of August 14, 1992, the agency informed the appellant that it had considered his reply to the proposed notice; that it found the reasons for the proposed removal action were sustained, but; because the appellant claimed a handicapping condition of alcohol abuse, and had entered into a LCA with the agency in order to obtain treatment for his alcohol problem, the removal decision was held in abeyance for a maximum period of two years. See IAF, Vol. 2, Agency File, Tab 4c.

The appellant included a copy of the LCA with his petition for appeal to the Board. See also IAF, Vol. 2, Agency File, Tab 4c. This Agreement noted the proposed removal action based, in part, on the appellant's alleged intoxication in the workplace, and it held the removal action in abeyance subject to the obligations set forth in the agreement. These obligations included the

agency's agreement to allow the appellant sick leave or leave without pay (LWOP) to the extent necessary for participation in a specific rehabilitation program; it was also agreed that if the appellant successfully completed a specific "trial period," the removal action, based on the reasons given in the proposal notice, be set aside. The appellant agreed to maintain conduct acceptable to his supervisor, including all aspects of punctuality, attendance, and leave usage. The appellant also agreed to enroll in the ACT Family Treatment Program, attend scheduled counseling sessions for the entire trail period, as prescribed by his Counselor, to sign a record of attendance at each session, and submit attendance verification to his supervisor, as requested. According to the LCA, even one instance of absence without leave (AWOL) would constitute cause for the appellant's removal. Because of the appellant's previous leave and attendance record, all of his requests for annual leave,

and "anticipated" sick leave for medical appointments and health care treatments were to be approved, in advance, by his supervisor; all sick leave absences were to be supported by "acceptable medical evidence regardless of the duration"; unanticipated absences due to illness or incapacitation could be approved but would require acceptable medical evidence regardless of duration and LWOP would be approved only in instances of verified illness or incapacitation. Absences not meeting these criteria would be considered AWOL, and would result in the reinstatement of the removal action.

Included in the LCA, the appellant agreed to waive appeal rights under the collective bargaining agreement, the Equal Employment Opportunity (EEO) process, and Board procedures for any action taken against him for attendance problems, or other on-duty misconduct related to alcohol abuse, or

failure to verify rehabilitation participation. The union agreed to encourage the appellant's efforts for successful rehabilitation and, during the trail period, the union would not pursue any appeal of any adverse action taken against the appellant for attendance or other on-duty misconduct related to alcohol abuse, or because of his failed participation in rehabilitation. The agreement concluded with the appellant's acknowledgment that he had discussed the terms of the LCA with his representative; he understood the terms, and; he freely agreed to them. The LCA was signed by the appellant, a National Treasury Employees Union (NTEU) official, and the agency.

By letter of December 8, 1992, the agency notified the appellant that he had violated the LCA because he had failed to report for duty from November 9 through 12, 1992, November 16, 1992, the afternoon of November 17, 1992, and November 18 and 19,

1992. Additionally, the letter asserted that the appellant failed to keep his scheduled counseling appointment with the ACT Family Treatment Program on November 18, 1992. The appellant's absences were charged as AWOL, and, consequently, the letter informed the appellant that he would be removed, effective December 8, 1992.

The appellant has the burden of proving by preponderant evidence the Board's jurisdiction to accept his appeal. 5 C.F.R. section 1201.56.

A waiver of appeal rights in a last-chance agreement will be enforced by the Board if the agreement is comprehensive, freely made and fair, and there is no evidence of agency bad faith or duress. See Freemont v. United States Postal Service, 55 M.S.P.R. 56, 59 (1992); Ferby v. United States Postal Service, 26 M.S.P.R. 451, 456 (1985). In such cases, the threshold issue of breach must be resolved before considering the scope and applicability of waiver. See

Stewart v. United States Postal Service, 926 F.2d 1146, 1148 (Fed. Cir. 1991); McCall v. United States Postal Service, 839 F.2d 664, 666-67 (Fed. Cir. 1988).

The appellant contends that he did not breach the LCA, and that the agency acted in bad faith. The appellant acknowledged that he was absent from work on November 9, 10, and 12, 1992. The agency asserts that the appellant called a secretary at the agency and told the secretary he was not reporting to work and to put him on sick leave. When he reported for work on November 13, 19 92, the appellant told his supervisor that he was unable to submit medical evidence to verify the nature of his illness and the dates of incapacitation. The appellant asserts that he called the agency on November 9 and 10, 1992, and sick leave was approved by his manager; on November 12, 1992, the appellant's friend (and co-worker) Mary Ebinger called the agency for sick leave on his behalf; and she spoke to a secretary who

told her the manager was not in the office. According to the appellant, Acting Manager, Iris Brown, later approved the appellant's absence.

Concerning November 16, 1992, the agency asserts that the appellant failed to report for duty that day, and when the appellant met with his supervisor on November 23, 1992, the appellant said that he had reported for duty (in the morning) but later phoned the secretary after lunch (though both the appellant's supervisors were present that day) to request annual leave. The appellant asserts that he was at work that day, but left at 11:00 a.m., after telling the Acting Manager he had a doctor's appointment. See IAF, Tab 1, Petition for appeal attachment, "Response to termination letter." The appellant concedes that he did not have a doctor's appointment, but that he actually left in order to attend an Alcoholics Anonymous (AA) meeting and he did not want

the manager (presumably Acting Manager Iris Brown) to know "about the problem."

On November 17, 1992, according to the agency, the appellant was seen at the agency's facility; he failed to report for work in the afternoon, and; he subsequently phoned the secretary to tell her he would be on annual leave that day. The appellant asserts that he reported to work that day, but that he then received a phone call from his brother concerning a "family situation." Because the manager was not in the office, the appellant told the secretary he would be on emergency annual leave. The appellant then claims to have driven to San Diego to see his brother.

The appellant did not report for work on November 18, and 19, 1992, and according to the agency, the appellant phoned the secretary on the 18th and told her he would be on annual leave that day and the next. According to the appellant, Mary Ebinger

called the agency on November 18, 1992, "to make sure that the manager knew the appellant would not be back to work until the following Monday; the secretary said the manager (Steve LePore) was not in, but "they" already knew (about his situation) and everything would be alright. Ms. Ebinger told Mr. Lepore that the appellant went to San Diego because of all the problems his brother was having. Also, the appellant had been depressed because of job boredom and "not being able to transfer out of review," and; talking to his brother allegedly helps the appellant. The appellant acknowledged that he did not attend the counseling on November 18, 1992, but explained that he was in San Diego at the time, and he claimed that this was the only occasion he had missed a counseling session.

It is evident, based on the appellant's own assertions, that he violated the LCA. The appellant's statements show that he did not comply with the LCA requirements that he obtain permission in advance of his absences,

nor did he submit medical documentation to support those absences purportedly caused by illness. I find frivolous the appellant's claim that his friend's (Ms. Ebinger's) statement that he was ill is tantamount to "medical evidence," as contemplated by that term in the LCA. The plain meaning of "medical" pertains to the science or practice of medicine.2 Moreover, the LCA provides that the medical evidence is to be "acceptable." It is also evident that the agency did not accept Ms. Ebinger's statement (oral and written) as "medical evidence," and in view of the appellant's numerous earlier attendance problems that prompted the LCA, and the undisputed fact that Ms. Ebinger was the appellant's friend, I do not find that the agency was acting in bad faith by rejecting the appellant's purported "medical evidence." The appellant claims that a supervisor (apparently "Acting Supervisor Iris Brown) approved some of his absences. However, the record shows that Iris Brown was

a co-worker, through she may have been Acting Manager during the period November 9 through 12, 1992. In a deposition taken by the agency which, during a telephone conference with the agency and the Board, the appellant acknowledged as his, the appellant stated that he did not believe Ms. Brown knew of the LCA. It is again evident that since Ms. Brown did not know of the LCA and its requirements, then whatever oral approval she may have given would not be properly binding on the agency.

In any case, even without considering the deposition submitted by the agency, i.e., considering only the appellant's explanations, the record shows that the appellant was absent on November 16, 1992, and in receiving permission to leave work, if in fact he was given such permission, he falsely claimed that he had a doctor's appointment. I find no merit to the appellant's claim that because rehabilitation is part of the LCA, his absence from work for

this purpose is an exception to the requirement for permission in advance. Further, the appellant's claim that the secretary's purported statements to him on November 18, 1992, that "everything is alright," justified his belief that his absence was approved, is again devoid of merit. The evidence shows that the appellant held a relatively high position, Internal Revenue Agent, GS-13, with the agency, and it is not credible that the appellant could reasonably believe, in the face of the important requirements of the LCA, he could properly absent himself from work based on the statements of a secretary. Further, it is undisputed that the appellant did not obtain advance permission for his absence to visit his brother in San Diego. The appellant contends that 'unanticipated" conditions justify absences without prior approval, and that his trip to San Diego was an emergency. But the agreement provides that unanticipated absences due to illness or

incapacitation may be approved if acceptable medical evidence is provided. The appellant's explanation for his trip to San Diego does not satisfy these criteria, i.e., that he be ill or incapacitated. Indeed, his vague explanation for the trip fails to even suggest a bona fide emergency. Finally, the appellant acknowledged that because of his trip to San Diego, he failed to comply with the LCA's counseling requirements.

In sum, the record shows, and I find, that the agency had commenced action to remove the appellant based on numerous prior incidents of intoxication at work and for his failure to report for duty. Because of the appellant's claim of alcohol dependency, the agency and the appellant agreed, by way of an LCA, to hold the removal action in abeyance to afford the appellant an opportunity at rehabilitation. The terms of the LCA, on their face, were directed at affording him a chance to obtain treatment if he met certain specific attendance requirements. Yet, the record shows the appellant subsequently

demonstrated a disdainful attitude toward the agreement; he showed by his behavior that, notwithstanding the LCA's strict requirements for prior approval of leave, as far as the appellant was concerned the agreement changed nothing, i.e., he could absent himself from work and justify the absences merely by calling in to work and telling the secretary he would be on leave. According to the appellant, calling a secretary and telling her that the caller's absence was approved leave (i.e. annual or sick leave) was common practice at the agency. For the sake of argument only, even if the appellant's claim is true, the appellant was not entitled to the common practice because he was serving a trail period under the clear leave restrictions set forth in the LCA. I therefore find that preponderant evidence that shows the appellant violated the LCA.

The appellant contends that he entered into the agreement because of duress. The appellant explained that he did not freely

and voluntarily enter into the LCA because he had to sign the agreement or he would have been terminated. However, it is only because the appellant wanted to continue his employment with the agency, that he felt he had no choice but to sign the agreement.

The fact that the appellant was faced with the unpleasant choice of entering into the agreement, or being removed, does not negate the pr esumption that the appellant's agreement was voluntary. See Montoya v. United States Postal Service, 40 M.S.P.R. 314, 317 (1989); Gonzales v. Department of the Air Force, 38 M.S.P.R. 162, 166 (1988). The LCA, on its face, shows that the appellant discussed the terms with his union representative, and the appellant understood and "freely" agreed to the terms. I therefore find no merit to the appellant's contention that his acceptance of the LCA was obtained by duress or coercion. I find, instead, that the appellant voluntarily entered into the LCA, and because he violated

BEST AVAILAB

that agreement, he thereby waived his right to appeal the removal action to the Board.

In view of this finding of no jurisdiction, no consideration is given here to the timeliness of the appellant's appeal.

Finally, the appellant requested a hearing in connection with his appeal. However, I find that the appellant's own version of the facts show the Board is without jurisdiction, and, therefore, a hearing is not appropriate in this case. See Wilson v. Merit Systems Protection Board, 807 F.2d 1577, 1583 (Fed. Cir. 1986); Vandewall v. Department of Transportation, 52 M.S.P.R. 150, 156-57 (1991).

DECISION

The appeal is DISMISSED.

FOR THE BOARD: "s/ Francis Lee"

Francis A. Lee

ABLE COPY

United States Court of Appeals for the Federal Circuit

NOTICE OF ENTRY OF JUDGEMENT WITHOUT OPINION

JUDGEMENT ENTERED: March 23, 1995

The judgement of the court in your case was entered today pursuant to Rule 36. This Court affirmed the judgement or decision that was appealed. None of the relief sought in the appeal was granted. No opinion accompanied the judgement. The mandate will be issued in due course.

Information is also provided about petition for rehearing and suggestions for rehearing in banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the Petitioner(s) in favor of the Respondent(s)

under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded its costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government payment should be made to the person(s) designated under the government statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

FRANCIS X. GINDHART

Clerk

cc: RONALD P. ACKERMAN

ELIZABETH A. RINALDO

BLUE V TREASURY, 94-3492

(MSPB - SF0752930526I-1)

(Unreadable).....R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

94-3492

CRAIG BLUE,

Petitioner

v.

DEPARTMENT OF THE TREASURY,

Respondent.

Judgement

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD

in CASE NO(S) SF0752930526-I-1

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (NIES, LOURIE, and BRYSON, Circuit Judges):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED MAR 23, 1995

S/Francis X. Gindhart pt

Francis X. Gindhart

Filed
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
MAR 23, 1995
FRANCIS X. GINDHART
CLERK

Last Chance Agreement

On April 9, 1992, Mr. Blue was issued a letter of proposed removal from the Service for intoxication in the workplace, which resulted in his failure to observe duty hours. After consideration of Mr. Blue' Oral Reply to the proposal letter dated April 9, 1992, it has been decided by the District Director that Mr. Blue should be removed. In consideration of Mr. Blue' medical condition, the removal will be held in abeyance subject to the following:

1) Execution of this Last Chance Agreement, and

2) Compliance with each of the obligations outlined herein.

I. On condition that Mr. Blue fully satisfies all items described in Part II of this Agreement, the Agency agrees:

A. To hold in abeyance the letter dated April 9, 1992, and the decision made by the District Director effecting the removal of Mr. Blue.

B. To allow Mr. Blue Sick Leave and/or Leave Without Pay to the extent necessary for participation in the rehabilitation program(s) noted in Part II of this agreement.

C. That if Mr. Blue successfully completes his trial period as noted below, no adverse action will be imposed on the basis of the Reasons and Specifications noted in the Chief, Examination Division's letter dated April 9, 1992, and the letter will be withdrawn.

II. Mr. Blue agrees:

A. To maintain conduct which is acceptable to his Supervisor. This obligation extends to all aspects of punctuality, attendance, and leave usage. Even one (1) instance of Absence Without Leave (AWOL) during the trail period noted below, may be cause for management to proceed in accordance with the decision to remove. Should such action occur, Mr. Blue will be notified of the Agency's decision in writing.

B. To enroll in the following rehabilitative program(s):

1) ACT Family Treatment Program-Mr. Blue agrees to attend scheduled counselling sessions and agrees to use a record of attendance which will be signed at each session, and to submit such verification to his supervisor, as requested, for review. Attendance at these meetings will continue on the scheduled basis as proscribed by his Counselor for the entire trail period. Mr. Blue agrees to participate in the program as proscribed by his Counselor until such time as it is determined that he has successfully completed the rehabilitation program.

C. That failure on his part to adhere to the above noted conditions for one (1) year from the date of this agreement shall be cause for removal, and may be terminated without additional advance notice, reply rights, or right to appeal or grieve the action.

E. To waive his appeal rights under the collective bargaining agreement (NORD III), as well as the Equal Employment Opportunity Commission and Merit Systems Protection Board complaint procedures, for any adverse action initiated against him during the trail period for attendance problems or other on-duty misconduct related to alcohol abuse, or failure to verify rehabilitative participation. III. The Union agrees:

A. To encourage Mr. Blue in any way feasible in an effort to ensure his success in his rehabilitative attempt.

B. To not pursue during the trail period any administrative, contractual, or legal appeal on behalf of Mr. Blue of any adverse action which may be taken against Mr. Blue by the Agency for attendance problems or other on-duty misconduct related to alcohol abuse, or for Mr. Blue's failure to verify rehabilitative participation.

That at the end of one (1) year, management will review his conduct record and determine if the trail period should be reinstated for an additional year. Even one (1) instance of misconduct may be sufficient reason to extend the trail period for an additional year.

D. That due to his previous leave and attendance record, all requests for annual leave, as well as anticipated sick leave during the trail period for medical appointments and health care treatments, must be approved in advance by his supervisor. All such absences for sick leave will require acceptable medical evidence, regardless of their duration. Unanticipated absences due to illness or incapacitation may be approved. However, such absences will require acceptable medical evidence regardless of duration. Leave Without Pay will be approved only in instances of verified illness or incapacitation. Any absences not meeting this criteria will result in the assessment of AWOL and will result in action being taken as noted above.

IV. Mr Blue acknowledges that he has fully discussed the terms of this last chance agreement with his representative. Additionally, that he fully understands the terms of this agreement and freely agrees to them.

V. The terms of this Agreement will not establish any precedent, nor will this agreement be used as a basis to seek or justify similar terms in any subsequent case.

VI. This Agreement sets forth the entire agreement of the District Director and Mr. Blue and superseded any prior agreement between them concerning the subject matter of this Agreement.

"s/ Dau F. H...?"	8/14/92
For IRS	Date
"s/Betina Kyle"	08-12-92
For NTEU	Date
"s/ CM Blue"	Aug 12, 1992
Employee	Date

Internal Revenue Service

District Director

Department of the Treasury

P.O.Box 391 Los Angeles,

Los Angeles, Ca. 90053

Craig Blue

Examination Division

Los Angeles, CA 90012

Person to Contact:

Labor Relations Section

Telephone Number:

(213) 894-4130

Refer Reply to:

RM:PL

Date: DEC 08 1992

PERSONAL AND CONFIDENTIAL

Dear Mr. Blue:

In a letter dated August 14, 1992, you were notified of a decision to sustain the reasons and specifications noted in your proposal letter dated April 9, 1992. In your

decision letter, you were also notified of the determination to hold the matter of your removal in abeyance.

On August 14, 1992, under the terms of an agreement between yourself, the National treasury Employees Union, and this agency, it was stipulated, in part, that the removal action would be held in abeyance for no more than two (2) years. Under the agreement, you agreed to maintain acceptable conduct, which extended to all aspects of punctuality, attendance, and leave usage, and to attend scheduled counselling sessions with the ACT Family Treatment Program. Your signature acknowledged your understanding and agreement to the stipulation that even one (1) instance of Absence Without Leave during the trail period, could be cause for Management to proceed with a decision to remove you from the Service. You agreed that all absences for Sick Leave purposes would require you to provide acceptable medical evidence, regardless of duration. You further agreed

that all requests for Annual Leave would be approved in advance by your supervisor. You also agreed that any absences not meeting this criteria would result in the assessment of AWOL, and would result in action being taken to terminate your employment with the Service.

You failed to report for duty at any time from November 9, 1992, through November 12, 1992. On each day you telephoned the secretary of your group and informed her that you would not be reporting for work and instructed her to place you on sick leave. You did not have permission from your supervisor to be absent from duty. Upon your return on Friday, November 13, 1992, you did not provide any medical evidence to support an assessment of sick leave. On Monday, November 23, 1992, you met with your supervisor and informed him that you were unable provide medical evidence to verify the nature of any illness or dates of incapacitation. Therefore, you were placed

in an Absent Without Leave (AWOL) status for 27 hours: (3 workdays).

You failed to report for duty at any time on Monday, November 16, 1992. Both your former and current supervisors were in the group on that day. On Monday, November 23, 1992, you met with your supervisor and informed him that you had reported for duty and subsequently telephoned the secretary after lunch to request annual leave. You did not have permission from your supervisor to be absent from duty. Therefore, you were placed in an Absent Without Leave (AWOL) status for 9 hours (1 workday).

On the morning of Tuesday, November 17, 1992, you were observed in the office by your supervisor. You failed to report for duty in the afternoon and you subsequently telephoned the secretary to inform her that you would be on annual leave for the remainder of the day. On Monday, November 23, 1992, you met with your supervisor and informed him that you had not reported for duty at any time on the

17th, and telephoned the secretary to inform her that you would be on annual leave the entire day. You did not have permission from your supervisor to be absent from duty. Therefore, you were placed in an Absent Without Leave (AWOL) status for 3 hours (12:30 - 3:30).

You failed to report for duty at any time from Wednesday, November 18, through Thursday, November 19, 1992. Your former supervisor was in the group on the 18th and your current supervisor was in on the 19th. On Monday, November 23, 1992, you met with your supervisor and informed him that you had telephoned the secretary on the 18th to inform her that you would be on annual leave on the 18th and 19th. You did not have permission from your supervisor to be absent from duty. Therefore, you were placed in an Absent Without Leave (AWOL) status for 18 hours (2 workdays).

On Friday, November 20, 1992, your supervisor contacted Bobby Carter of the ACT

Family Treatment Program, who indicated that you failed to make your regular appointment for counseling with him on Wednesday, November 18, 1992.

The above instances of unauthorized absence and failure to attend a scheduled counseling session have violated the agreement you signed on August 12, 1992. Since you acknowledged your understanding of the consequences for such conduct by your signature of the agreement, it is my decision to remove you from the Internal Revenue Service effective December 8, 1992.

Sincerely,

"s/ R. A...?" acting

for District Director

During the week ending November 15, 1992, I was acting section chief for Chris Mitchell, Section Chief, QMS.

Craig Blue, reviewer, was granted leave on November 9th, 10th and 12th of that week. On the 9th of November our secretary, Lawrence Duran took his call. On November 19th and 0ovember 12, 1993, I talked to Craig. He reported that he was ill.

I swear under penalty of perjury this day, September 20th, 1993, that the above statement is true and correct.

"s/ Iris Brown"

DECLARATION OF BOBBY KIRVEN

I, bobby kirven, declare and state as follows:

1) I am a priority Coordinator in PSP (Planning and Special Programs), Examination Division, Los Angeles District and have held this position several years.

2) On November 16, 1993, I was working in PSP, Room 7566. Sometime in the morning Craig Blue met with me to discuss, among other things, transcript information (related to an involved restricted interest computation). He started to go back to QMS a couple of times but I kept calling him back with other problems. He was also with my manager, Tom Winford, for a time. All together he was with me or my manager for over 2 hours.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 30th day of June 1993, in Los Angeles, California.

"s/ Bobby Kirven"

Bobby Kirven

California Unemployment Insurance

Box 944275

Sacramento, CA 94244-2750

Re: Case No. 93-17650

Craig M. Blue

September 23, 1993

To Whom it May Concern:

I have been in IRS management for 20 years, including 16 years as a Branch Chief. I have worked in the Los Angeles District for 29 years. I am now the Chief of the International Branch.

When an employee is required to obtain emergency leave approval from his/her manager and the manager is not available, it is appropriate to leave a message with the person closest to the manager. This person is usually the secretary. The manager can then call the employee if he/she has any questions.

Sometime in November of 1992, I was informed by one of my managers, Nancy Stayer, that Christine Mitchell, then manager of a group in my branch, called to see if Mary Ebinger left work early to take Craig Blue to a hospital in Lake Tahoe. Shortly afterwards I talked to Christine Mitchell on the subject.

Mary Ebinger is an examiner in my branch. She was attending a CPE class in Alhambra on November, 17 and 18, 1992. It does not make sense that she would call Christine Mitchell at 2:30 on the afternoon of November 17, 1992 and leave a message saying she was taking Craig Blue to a hospital in Lake Tahoe.

a) There is no phone available in the classroom and there were no messages for her on the answering machine. She couldn't have known that Craig Blue left his office early on

November 17, 1992.

b) She didn't leave CPE early on the 17th and she was in class on the 18th of November.

I have previously requested Craig Blue to be transferred to my branch but I was told that the transfer would not be authorized as others were allowed to do after their tour of duty in the Quality Measurement Section. Craig Blue was an examiner in one of the branches I managed previously. I know him as a highly productive employee and I would be willing to have in my branch currently.

I swear under penalty of perjury this day, September 23rd, 1993 that the above is true and correct.

"s/ Willard E. Blaylock"

Willard Blaylock

Chief, CEB-8

(818) 244-2863 work

(310) 516-7662 home

DECLARATION OF MARY EBINGER

I, MARY EBINGER, declare and state as follows:

1) I am an International Examiner in the International Branch, Examination Division, IRS Glendale Office.

2) Previous to April of 1992, I was a Joint Committee Coordinator in Quality Assurance Branch (now Quality Measurement Section of PSP). I worked closely with Craig Blue for six years and, as a result, I have become familiar with his work. We have also become friends.

3) Craig Blue asked me if he could sleep on my sofa for a few days because he was sick with the flu and didn't want to be alone. He was at my place from Sunday (November 8, 1992) to Friday morning (November 13, 1992). He indeed had the flu.

4) Craig Blue called in each morning (November 9, 10 and 12, 1992) and asked to speak with the acting manager. He left a message with the secretary only on the days the acting manager was not available.

5) On November 9, 1992, he called around 7:00 A.M., just before I want to work. On November 10 and 11, 1992, he called closer to 7:30 A.M. (I didn't go to work on these two days and he slept later). He was adamant about calling within one hour after his normal starting time of 6:30. A.M.

6) On November 25, 1992, Craig Blue called me at the Glendale Office. He said that Steve LePore just asked him if I could give him a statement ver..fying that he (Craig Blue) was sick during the week of November 9, 1992. Craig Blue said Steve LePore was expecting it Monday or Tuesday of next week.

7) I was in QMS on Tuesday, December 1, 1993 at 10:30. I wrote a statement verifying

that Craig Blue was staying at my place during the week of November 9, 1992 and he had the flu. I gave the statement to Craig Blue and he walked to Steve LePore's office with it.

8) On December 7, 1992, I was again in QMS. I discussed the situation with Steve LePore. Again I confirmed Craig Blue was sick during the week of November 9, 1992. I explained to him that Craig Blue was throwing up every hour or less and no doubt couldn't have driven to a doctor without being sick in the car. Steve LePore said he received my statement (dated December 1, 1993) and he indicated to me that he accepted Craig Blue's illness.

9) Craig Blue called me on Tuesday, November 17, 1993, from San Diego. He explained to me that his brother, Wayne Blue, called him at work and was very upset. Craig Blue said that his brother asked him to come

down to San Diego to help him resolve a serious family problem. Craig Blue told me he expected to be back sometime over the weekend.

10) On Wednesday, November 18, 1993, I called QMS to make sure Steve LePore understood Craig Blue would not be back until Monday. I am sure I called before 8:00 A.M. from Alhambra (where I was attending CPE). I specifically asked for Steve LePore. I also wanted to congratulate Steve LePore on his new position. The secretary, Lawrence Duran, informed me that Steve LePore would not be in. I than asked her if Steve LePore knew that Craig Blue would be on leave November 18 and 19. Lawrence Duran told me to stop worrying because "we already know and it is taken care of".

11) Shortly after talking to Lawrance Duran on November 18, 1993, I called San Diego. I relayed to Craig Blue the

conversation I had with Lawrence Duran.

12) On December 7, 1992, during my conversation with Steve LePore, I gave him a more complete explanation of Craig Blue's family emergency. Steve LePore told me there was no problem with the sick leave taken the week of November 9, 1992, but that "they" (meaning the "front office") had a problem with the week of November 16, 1992, because of an inconsistency between Craig Blue going to San Diego and a phone message Christine Mitchell received saying "someone named Mary" drove Craig Blue to Lake Tahoe'. I told Steve LePore that this message made no sense at all. I never even considered going to Lake Tahoe. I told Steve LePore I was working all week. I haven't a clue as to how this story started.

13) On December 15, 1992, my manager Nancy Stayer, informed me that Christine Mitchell called her and asked if I left CPE

early on Tuesday, November 17, 1992, to drive to Lake Tahoe. Fortunately, Nancy Stayer was in class with me on Tuesday and Wednesday, November 17 and 18, 1992. Nancy Stayer also said she related this conversation to her manager, Willard Blaylock.

14) It never occurred to me to go to Lake Tahoe. Craig Blue was in San Diego when I called his brother's home on November 18, 1992.

15) Also on December 7, 1992, Steve LePore and I discussed the effects boredom has on Craig Blue. I explained to Steve LePore that boredom for Craig Blue creates stress that makes him more vulnerable to drinking again. This was explained to me by his counselor and by AA. Steve LePore told me he has been trying to discuss the problem with Carol Greenstein but she wasn't available. Steve LePore was hoping to have a meeting with Carol Greenstein the next day.

16) On June 30, 1993, I was working in QMS. The secretary, Lawrance Duran, said she wanted to make a statement but that, after discussing it with someone from the union, she decided she didn't feel comfortable "going against" management. But she did say it would be all right if I included her comments in my statement:

a) Lawrence Duran told me she remembers Craig Blue telling her on November 17, 1992, about the phone call he received from his brother. Craig Blue told her his brother was very upset. Craig Blue waited for awhile because the manager was away from his desk. After several minutes he left.

b) Later that same day he called from San Diego and said that, because of a family emergency regarding his brother and his two daughters, he would not be back to work until Monday. Lawrence Duran remembers telling him the manager was either gone for the day or in a meeting, but that she would make sure he

got the message. Lawrence Duran told me she remembers that Craig Blue sounded upset but she is not sure if it was because he couldn't speak with the manager or because of his family.

c) Lawrence Duran remembers me calling the next morning (November 18, 1992) and asking to speak with Steve LePore. Lawrence Duran stated that she told me the leave for Craig Blue was already approved because she thought it was.

d) Lawrence Duran told me that she never called Christine Mitchell with her phone messages because Christine Mitchell told her not to. Lawrence Duran told me she always waited for Christine Mitchell to call her. Lawrence Duran was emphatic about this. Lawrence Duran told me that she doesn't know how Christine Mitchell got the idea that Craig Blue was going to a hospital or to Lake Tahoe. Lawrence Duran cannot remember now if this message could have gotten confused with another message regarding something else.

17) I was working in QMS on December 8, 1992, the day Craig Blue received the termination letter. Steve LePore asked me to wait in QMS while he and Craig Blue want to Ira Brown's office where Craig Blue received the termination letter. On coming back to QMS, Steve LePore advised me to contact Bill Evans, a union representative. Steve LePore was visibly upset and said he expected Craig Blue would be back and that he would "save his desk".

While Craig Blue was packing, I want to see Ira Brown and Bill Evans. Ira Brown told me he knew nothing about it and was involved because he was the only branch chief available. Carol Greenstein was on sick leave.

I briefly explained the situation to the union representative, Bill Evans.

18) During december, January and February, I spoke several times with Bill Evans and Jay Nelson, both union representatives. Bill

Evans told me that the only manager who was willing to talk to him was Carol Greenstein, and that was just to say that Craig Blue broke the contract but she wouldn't explain in what way.

19) Craig Blue talked with me about taking the case directly to court, but his attorney, Elizabeth Smith (also my sister), advised him that it may be thrown out of court for failure to exhaust administrative remedies. She advised him to file a grievance first with the employer. Craig Blue was prevented from doing this because management's position was he had no appeal rights, not even the right to appeal that the Last Chance Agreement was not violated.

20) We, Craig Blue and I, sent documentation to everyone we could think of, including Carolyn Billingslea, the Executive Assistant, District Director, District Director and the Regional Office. Information was sent to these people in an attempt to show that Craig

Blue did not violate the Last Chance agreement. It is clearly not true that Craig Blue delayed in expressing his position that he followed the procedures in the agreement.

21) Finally, in February, Bill Evans suggested to Craig Blue and I that we wait until the new Chief of Examination arrives in March. He said there was nothing he could do until than.

22) I told Bill Evans in December and January that, based on the circumstances, Craig Blue did not violate the Last Chance agreement and that I couldn't understand why no one was willing to discuss it. Bill Evans agreed.

23) Willard Blaylock, the Chief of the International Branch, indicated to me that the reason for Craig Blue's termination may have been because of the inadequate budget in the Los Angeles District

23) Vivian Nelson and other union representatives indicated to me that

Christine Mitchell was offered either a cash award or a specific job assignment if she fired Craig Blue.

24) I talked with Iris Brown on December 1, 1993. She told me that she remembers that Craig Blue called in each morning (November 9, 10 and 12, 1992) and she approved the leave.

25) On December 1 1993, Iris Brown also said she remembers that Craig Blue told her he was leaving for an appointment and that he would be on sick leave. She remembered it as being just before lunch (she normally goes to lunch shortly after 11:00), but she didn't remember the exact day. She said it could have been either November 16 or 17, 1992.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 5th day of July 1993, in Los Angeles, California.

"s/ Mary C. Ebinger"

Mary Ebinger

Wayne M. Blue
1319 La Presa Ave.
Spring Valley, CA
91977

Dec 15, 1992

To Whom it May Concern:

I am writing this letter at the request of my brother, Craig M. Blue, but most importantly in response to the recent events concerning his job. Craig informed me that he was being fired for taking unapproved leave from his job. I find this extremely disheartening if it had anything to do with Craig leaving his workplace from Tuesday (Nov. 17th) to Sat. Nov. 21st).

I have two young children and my wife and I are expecting a newborn in January. Complications had grown into an emergency situation on Tues., (Nov. 17th) so I called Craig to ask if he could help out. I have no immediate family in San Diego. Craig arrived at our house Tues evening (Nov. 17) and left Sat. afternoon (Nov. 21st).

I am saddened having to write this letter if my brothers absence from work while being at our house has compromised his work.

Do not hesitate to write me at the above address if you have any questions.

Sincerely,

"s/ Wayne M. Blue"

Job Element Appraisal

Name of Employe	Date of Appraisal
CRAIG BLUE	AUGUST 9, 1991
Current Position	Division Branch
REVIEWER/JOINT COMMITTEE COORDINATOR	EXAMINATION QAB

Covered	Grade	Series	SPD No
DECEMBER 1, 1990 thru NOVEMBER 30, 1990	13	512	90394

Reason for Appraisal

ANNUAL

Job Element of Position	Job Element Rating				
	5	4	3	2	1
INVENTORY MANAGEMENT	X				
APPLICATION OF TAX LAW AND ACCOUNTING PRINCIPLES	X				
APP. OF IRM PROVISIONS AND PROCEDURAL DIRECTIVES	X				
MANAGERIAL OBSERVATIONS	X				
COMMUNICATIONS		X			
OTHER DUTIES AND ASSIGNMENTS		X			

Employee s/ CM. Blue 8-15-91

"s/ Onetta Robinson" "s/ MT"

Chief, Integrated section, IE-2 8-14-91

August 12, 1991 (Branch chief)

ATTACHMENT TO FORM 6850

CRAIG BLUE

Craig, you have been assigned to the Quality Assurance Branch for approximately seven years. You are the most senior and knowledgeable Joint Committee Reviewer. You handled the most complex cases, and you have greatly assisted me as well as the prior manager with various technical and administrative tasks. You have always been very cooperative, and worked hard. You continue to work in an outstanding manner.

1) INVENTORY MANAGEMENT - OUTSTANDING

A. Exceeds D. Exceeds G. Exceeds

B. Exceeds E. Exceeds

C. Exceeds F. Exceeds

A. Due to Branch priorities, you have been assigned a variety of cases during the year. These included 1120-TCMP's, on-site reviews for large case, short statute cases as well as your own Joint Committee Inventory. You are one of the fastest reviewers and most experienced in Quality Assurance Branch. You have your inventory organized to handle all of the above cases in a timely manner. You controlled most of the Joint Committee Inventory, and made the decision as to which cases needed to be worked and in what order. Because alot of these cases mean large refunds for many large companies it was important to get them worked as soon as possible. In some cases it has saved a company from having to file bankruptcy. You have been very quick in taking care of any cases that have turned into congressionals, and usually take care of those yourself.

B. There are various procedures required to close Joint Committee cases. Cases are

required to have all AIMS documents, closing letters and transmittals completed so that they can be placed on the "shelf to await clearance for the National Joint Committee Staff. In many instances, a case will require both Forms 5351 and 5348. Craig, you always complete the proper AIMS forms. This is crucial, since a case will reject if the AIMS closing documents are not proper. You go a step further to ensure proper case closure. You will attach notes to the case file to explain any unusual circumstances. This is very helpful in my review of your cases, and very helpful in assisting ESP with case closure processing.

C. Reviewers are required to complete a QUISS sheet and a case control sheet for each case. The proper statute for each year must be listed on both sheets. Form 5348 must also be completed if the statute has to be updated on AIMS. Craig, your inventory sheets are always prepared timely and

accurately, including required AIMS documents. Where statutes are imminent, you make it a habit of soliciting statute extensions before issuing the Statutory Notice of Deficiency. This was noted regarding one of your cases which had been assigned to 30-days. Due to priorities in the Branch, a large inventory of unassigned cases were on hand. You screened over 150 cases to ensure that ample time remained on the statutes. You pulled all cases which required immediate attention, and ensured their timely processing.

D. Craig, your in-depth knowledge of the Joint Committee Program enables you to require, in most instances, no managerial promting. As stated earlier, I can always depend on you in critical times. This usually involves cases with imminent statutes. In one instance, a case was submitted with less than one month remaining on the statute. Because of international

issues the RAR had to be approved by District Counsel. District Counsel made a $900,000 adjustment to the RAR, two no-changed years did not include consideration of NOLDS carried back to those years and required AIMS documents were not included in the file. Craig, you had to confer extensively with the domestic and international agents and rewrite the entire RAR so that the case could be closed expeditiously.

E. During QABs conversion to a new computerized inventory system, Quiss, you brought to the attention of the manager, that a number of Joint Committee cases were not updated on QUISS. As a result a procedure was put in place to ensure updating of these types of cases. You also informed me of any unusual National Office or taxpayer inquires. You did an excellent job of keeping me current on activities involving a large case aerospace company. This case involved working extensively with District Counsel,

the case manager, the examiner and National Office until it was resolved. This case was one of the oldest cases in the section. Thanks to you the case is closed.

F. As stated in aspect C & D, you have done an exceptional job reviewing and processing short statute cases. You have kept me informed of the statutes and alerted me to any potential problems. You are conscientious about short statutes cases. Where possible you solicit extensions for at least one year. You worked your inventory on a first-in/first-out basis giving top priority to short statute cases. You put forth extra time and effort to protect the interest of the government. One case was walked into QAB on a Friday afternoon. The statute was going that day. You completed the Statutory Notice. Since no one in ESP was available to process the case, you also mailed the Notice certified.

G. Craig, your development of the Enable

Programs for Joint Committee case reports and letters have been a great asset. You typically review expedite refund cases and prepare the reports in less than a day. You taught detailees how to review expedite refund cases and prepare the reports using Enable. Craig, your assistance helped to expeditiously reduce Joint Committee inventory in PSP.

II. APPLICATION OF TAX LAW AND ACCOUNTING PRINCIPLES - OUTSTANDING

A. Exceeds D. Exceeds

B. Exceeds E. Exceeds

C. Exceeds

A. Craig, in one reviewer's memorandum you returned the case to the group because the manager had allowed depreciation expense for transportation equipment that you determined the corporation did not own. You also determined that the disallowed expenses were improperly charged to the shareholder as dividends, since there was no evidence of

benefit to the shareholder. In several reviewers memorandums, you provided proper facts and computations where the examiner did not properly carryback losses or did not consider the loss carryback at all. You are QABs "expert" on banks and savings and loans. You reviewed a savings and loan company containing 26 tax returns. The parent company acquired six other savings and loan companies. This was a very complex examination. Another case involved a construction company where $4,200,000 in unreported income was adjusted, and another company involved the disallowance $6,100,000 in charitable contributions for an ESOP in accordance with IRC 2057.

B. Craig, you do an exceptional job of determining that the examiner has properly developed all issues with supporting documentation and case development. You have returned numerous cases with significant tax impact. Many of the cases returned on

reviewers memorandums are returned to senior revenue agents. Rarely, if ever, do you receive objection to the issues you raise. Reflecting on your experience, your memorandums are concise and to the point, and state the applicable code section, court case or other authority. An example taken from one of your 3990's is "Of particular concern seems to be when the obsolete inventory was sold or "trashed". It has to be done within 30 days of the inventory date per T.R. 1.471-2(c) and Thor Power Tool Co. vs. Commissioner, 79-1 USTC para. 9139 (Sup.Ct 1979).

C. Your Reviewers Memorandums are direct and to the point. You address the facts, state the items in question and provide the applicable law or regulations. Where the facts are questionable, you provide the proper cites and guidelines for alternate issues. These changes have had significant tax impact. You are able to do this as a

result of the knowledge you have gained through extensive research. An example of the research that you have had to do was taken from a 3990 where you question the Taxpayers active involvement in three partnerships and two S corporations vs. passive involvement, and how the income should be classified. In your opinion, and from all the research you concluded that one company was nothing but an investment conduit for another entity. That particular company did nothing but invest. If the loss is passive, then at minimum 35% of the claimed loss should be disallowed.

D. You are the most experienced senior Joint Committee Reviewer. As a matter of fact, some people refer to you as Mr. Joint Committee. You are assigned and work some of the most difficult cases. All of the other reviewers go to you with their questions and just bounce things off of. You give assistance to personnel in other districts

also. You assist me by following up on responses to Service Personnel in our district and in other districts regarding technical issues. You also take care of the tailend closing of the Joint Committee Cases. You control the inventory of "Shelf Cases". You are quick, thorough and accurate with your reviews and responses.

E. You are an excellent technician. In your review of Joint Committee Cases, you have demonstrated that you can correctly determine whether the examiner conducted the examination in accordance with the Audit Techniques Handbook. In various reviewers memorandums you recommend various audit techniques to the examiners - verify that transactions between related taxpayers are arms-length; use transcripts to determine NOLD and NOL for intangible capital asset and should not be expensed; verify that expenses do not include amounts for voided checks; an examination of four months of computer

listings is not enough to ascertain the correctness of the taxpayers books and records.

III. APPLICATION OF IRM PROVISIONS AND PROCEDURAL DIRECTIVES - OUTSTANDING

A. Exceeds D. Exceeds

B. Exceeds E. Exceeds

C. Exceeds F. Exceeds

A. In several reviewers memorandums, you have addressed the compliance of the examiner with administrative and procedural requirements such as: certain prior and subsequent year returns must be included as part of the Joint Committee package; the RAR must reflect taxable income as adjusted due to carryback of losses per Forms 1139 for years closed as no-change.

B. You correctly determine whether the examiner has considered package audit and required compliance checks. Examples include: bank deposit analysis should be used

as a tool in determining that all income has been reported; wages per return and Forms 941 should be reconciled; related shareholder returns should not be separated from the unagreed corporate return. You have sent out 3990s for missing information such as: "The 7712 through 8012 returns are missing from the case file. Joint Committee procedures require that all years affected by the loss years be included in the case file." "The taxpayer filed Forms 1139 for 7912 and 7912 in order to carryback credits from 8112 and 8212. Please obtain copies of these 1139's for the case file." "when partnerships are involved in the computation of an NOL because of they are one of the subsidiaries, they should be included in the package."

C. There is documentation via 3990's where you have addressed various items required for proper case assembly. Examples are securing both husband and wife signature on Form 870 when the tax exceeds $1000; Form 872-T is

required for surveyed returns held open by Form 872-A; Form 4318 should reflect changes in work papers and the RAR. The three documents would all have the same figures; form 5344 should be comp..eted for all returns involved. All Joint Committee Cases must have a spreadsheet leaving a audit trail on the adjustments. You have stated: There is no Joint Committee spreadsheet in the file. A Joint Committee spreadsheet should begin with taxable income per return and work through prior RAR's, NOL and credit carrybacks, recaptures and minimum tax to arrive at the current RAR results. A spreadsheet in this format is attached. It reflects the numbers tha: could be determined from your RAR.

D. You correctly verify that the Power of Attorney consents, waivers and agreements are valid. In one case in particular, you recognized the name of a preparer who had been barred several years ago. He had signed the form 872-A while he was barred. You immediately secured another form 872-A with

only two days left on the statute, and referred the preparer to the Director of Practice.

E. In several reviewers memorandums, you have addressed the requirement to pick up prior, subsequent and related returns. This was noted in other aspects regarding the improper closure of returns as no-change audits, the carryback and carryforward of Joint Committee losses and credits, flow through adjustments from related entities and various other comparative analysis.

F. You select the appropriate Joint Committee notification letters for mailing to the taxpayer. While sitting in as Section Chief, you have returned several cases to the Joint Committee Reviewers as well as the regular reviewers for using the improper/not the best letter. You also edited one of our letters to comply with new tax law, before a revision came out.

IV. MANAGERIAL OBSERVATIONS - OUTSTANDING

A. Exceeds B. Exceeds

A. You timely and accurately performed managerial reviews to provide various levels of management with information concerning adherence to Service policies and procedures. You worked extensively with National Office Joint Committee, Large Case, District Counsel, other local personnel and personnel in other districts. For several years you prepared the monthly and quarterly Joint Committee reports for their Districts. You have trained other reviewers to prepare these reports. The reports provide a summary of technical and procedural issues raised by the reviewer on cases returned to the group. During the past, you have put Joint Committee training sessions for Los Angeles and Laguna Niguel Districts. You are a member of the TECH-Tips QAB Newsletter Staff. You have written several articles which include law changes for Alternative Minimum Tax and business credits.

B. As indicated in previous aspects, you have correctly provided managerial observations and other items specified in the IRM auditing standards as evidenced in your various reviewers memorandums. You have emphasized these required observations to the reviewers during your sit-in assignments. Craig, you have net extensively with Problem Resolution Personnel to provide procedural and technical and assistance to revenue agents in the field. The feedback has been positive. The managers appreciate your assistance on behalf of our Branch. Because you are so well known for your knowledge of Joint Committee cases, you are name requested by many from within the District, from other districts and from outside of the Service. You are able to resolve and answer nearly all concerns without my assistance.

V. COMMUNICATIONS - EXCEEDS FULLY SUCCESSFUL

A. Exceeds B. Exceeds C. Meets

A. As a Joint Committee Coordinator, you have prepared numerous reports to the Joint

Committee on Taxation. The few times that I have returned a report to you for corrections it has usually been for a typo error. You have taught other Joint Committee Coordinators to prepare the monthly and quarterly reports, which you have reviewed for accuracy and clarity. You also make sure that the other districts for whom you are submitting a report, gets a copy.

B. Instances where National Office has questions regarding the audit decisions on extremely complex Joint Committee cases, you have requested that the questions be sent in writing so that management can accurately respond to the inquiries. These inquiries are usually answered by you and forwarded thru the Section Chief.

VI. OTHER DUTIES AND ASSIGNMENTS - EXCEEDS FULLY SUCCESSFUL

A. Exceeds B. Exceeds C. Meets

A. You are an over-achiever. You work efficiently and effectively. You do not

waste time. You work without supervision. You are very dependable. I can trust you to finish any task assigned as quickly as possible. You volunteered to be one of the people involved in the Tech-Tips Newsletter. You have written several articles for the newsletter. You have helped in the review of other reviewers work as well as training them. You have assisted on other programs, besides Joint Committee when the need arose.

B. You have sat-in as Section Chief on numerous occasions. You assigned and closed out cases, reviewed and approved reports to the National Joint Committee, monitored and assigned short statute cases, worked the Statute Alert Report and reviewed and approved the time roster. You have been called upon to answer several memorandums for the Staff Assistant.

C. During your acting assignments time roster reports were accurate and submitted timely. Joint Committee monthly and

quarterly reports were prepared timely, neatly and accurately using the IBM computer. You prepared and timely submitted monthly status reports for PSP Joint Committee Inventory. You have also prepared the necessary reports to be submitted to the National Office for special assignments of Joint Committee cases for other districts.